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NOTE AND COMMENT.

ADVERSE POSSESSION IN THE CASE OF THE RIGHTS OF WAY OF THE PACIFIC RAILROAD COMPANIES.—While the weight of authority is probably to the effect that railroad rights of way may be lost by adverse possession, the authorities are by no means agreed. See 12 MICH. L. REV. 144. The rights of way of certain of the Pacific Railroad Companies have been declared not to be subject to the ordinary rules as to adverse possession, on the ground that by the Congressional grants the four-hundred-foot-strips were conveyed only for railroad purposes with the ultimate possibility of reverter in the United States, which had the effect of making such lands inalienable by the railroad companies whether by voluntary deed or by lapse of time under the general statutes of limitation. *Northern Pacific R. Co. v. Smith*, 171 U. S. 267, 43 L. Ed. 160, 18 Sup. Ct. 794; *Northern Pacific R. Co. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. 671; *Northern Pacific R. Co. v. Ely*, 197 U. S. 1, 49 L. Ed. 639, 25 Sup. Ct. 302. Before the decision in the last mentioned case an act of Congress (April 28, 1904) was approved whereby it was declared "That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company,

of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any act of Congress, are hereby legalized, validated, and confirmed: *Provided*, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the centre of the main track of the railroad as now established and maintained." 33 Stat. 538, c. 1782. The court held that under the provision quoted occupants of the other one hundred feet of the right of way who had been in adverse possession thereof for the statutory period acquired ownership, the adverse possession being considered "as tantamount to a conveyance."

By an act of Congress approved June 24, 1912, (37 Stat. 138) it was provided as follows: "That all conveyances or agreements heretofore made by the Union Pacific Railroad Company," or certain other enumerated railroad companies, "of or concerning land forming a part of the right of way * * * granted by the Government * * * and all conveyances or agreements confining the limits of said right of way, or restricting the same, are hereby legalized, validated, and confirmed to the extent that the same would have been legal or valid if the land involved therein had been held by the corporation making the conveyance or agreement under absolute or fee simple title." If the act had concluded at that point, it would seem that its construction would have been essentially the same as that given to the act of 1904, and an adverse possessor of a portion of the right of way for the required period of time prior to the enactment of the statute would have acquired absolute ownership. But in the second paragraph it was further declared "That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporation,*** by or through adverse possession of the character and duration prescribed by the laws of the State in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way." By § 3 of the Act it was provided that nothing in the act shall be considered as having the effect to diminish "said right of way to a less width than fifty feet on each side of the center of the main track."

In *Union Pacific Railroad Company v. Laramie Stock Yards Company*, 34 Sup. Ct. 101, it appeared that the railroad company had brought an action of ejectment to recover possession of certain lands which were within the limits of the original four-hundred-foot strip granted by the Government; that defendant company had answered setting up ten years adverse possession before action instituted and title thereby under act of June 24, 1912; that plaintiff had demurred to said answer; and that said demurrer had been overruled, judgment being entered that plaintiff "take nothing in said action." The Supreme Court reversed the lower court, holding that the second paragraph of the act of 1912 operated only prospectively, that said act did not have the effect of vesting title in an adverse possessor whose possession was prior to the passage of said act. Much weight was given to the fact that the first paragraph contained the expression "heretofore made," while nothing

of that sort appeared in the second paragraph. The two parts of the act of 1912 in question, the one dealing with "conveyances" and "agreements," the other regarding adverse possessions, were both contained in one section, though in separate paragraphs. The first paragraph used the expression "heretofore made," and under that provision, if Congress had stopped there, the court would have undoubtedly held, following the *Ely* case, that a prior adverse possession for the statutory period had conferred title upon the possessor. But Congress went on, in the same section, and mentioned expressly adverse possession, omitting the word "heretofore." No language, however, expressly looking to the future was used. Admittedly, as the court said, it was a question of construction as to whether the adverse possession paragraph was intended to speak to the past or to the future. By applying the general rule that statutes should, unless it appears that the intention was otherwise, be construed as operating prospectively, the court concluded that the provision in question looked to the future. It is submitted that the history of the legislation, the construction given to the act of 1904, and the wording of the whole of § 1 of the act in question showed a contrary intention, and that the lower court was right.

R. W. A.

RECOVERY OF SALARY BY DE FACTO OFFICER WHERE THERE IS NO OTHER CLAIMANT.—In two recent cases, *State ex rel. Kleinstuber v. Kotecki* (Nov. 8, 1913), 144 N. W. 200 and *State ex rel. Elliott v. Kelly* (Oct. 7, 1913), 143 N. W. 153, the Supreme Court of Wisconsin considered the question of the right of the de facto officer to recover the salary of his office, and held that where there is no other claimant and the de facto officer has taken possession of the office in good faith he is entitled to the salary attached to the office. In each case the question arose in a mandamus action to compel the disbursing officers of a city to take certain steps in payment of the salary attached to a city office. The opinion in the later case contains no general discussion of the de facto officer's right to salary. It contains simply an assertion of the right and refers to the earlier case for authority for the principle. In the earlier case, *State v. Kelly*, on this point Justice MARSHALL in his opinion said, "We agree with counsel that such (that the de facto officer who takes possession of the office in good faith, where there is no other claimant, is entitled to the salary) is the rule by the better, if not the weight of, authority. We decline to follow the lead of courts which deny the right to compensation to officers de facto who have, in good faith, performed the duties of a de jure office, when there is no other person who, under any circumstances, can properly claim the salary incident. The salary of an office is an incident thereto and not, necessarily, an incident to service by a de jure incumbent. Therefore, in case of the incumbency being, in good faith by an officer de facto, and (no) adverse claimant, there is no justice in denying to the occupant the compensation incident to the place during such incumbency if the corporation is willing to grant it."

The court, in this case, evidently disregards the quite generally accepted principle of the law of public officers that the basis of the officer's right to